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Supreme Court, U.S.
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CLERK

THE SUPREME COURT OF THE UNITED STATES

October Term 1986

Thomas E. McGovern, Appellant

vs.

State of New Jersey, Appellee

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

JURISDICTIONAL STATEMENT

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45pp

QUESTIONS PRESENTED

Do the arbitrary and mandatory 10-year license revocation provisions of N.J.S.A. 39:4-50(a)(3) that apply to third offenders of New Jersey's Drinking Driving Law, violate due process of law?

Does the failure of N.J.S.A. 39:4-50(a)(3) to provide a means for a third offender of that law to seek reinstatement of his license before the end of 10 years violate due process of law?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

Thomas E. McGovern, Appellant

vs.

State of New Jersey, Appellee

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

JURISDICTIONAL STATEMENT

Appellant submits herewith the jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINION BELOW

The opinion of the Superior Court of New Jersey, Appellate Division, was a non-published opinion and held that the 10 year mandatory license revocation provision of N.J.S.A. 39:4-50 does not violate due process of law and the failure of that statute to provide a means for

reinstatement of a third offenders license prior to the expiration of the 10 year period is also not a violation of due process of law.

GROUNDS OF JURISDICTION

The proceedings in this case challenged the mandatory 10 year license revocaton provisions of New Jersey's Drinking Driving Law, N.J.S.A. 39:4-50(a)(3), as being repugnant to the Constitution of the United States.

The judgment sought to be reviewed is that of the Superior Court of New Jersey Appellate Division dated June 30, 1986 and filed on the same date. It upheld the validity of the challenged provision of the Statute.

A petition for certification of the judgement of the Appellate Division of the Superior Court of New Jersey was submitted

to the Supreme Court of New Jersey. The petition was denied September 30, 1986 and filed on October 2, 1986.

On December 19, 1986 a notice of appeal to the Supreme Court of the United States was filed with its clerk.

Jurisdiction for this appeal is conferred by 28 U.S.C.S. Section 1257 (2). This section of the United States Code sets forth that final judgments of the highest court of a state may be reviewed by the United States Supreme Court by appeal where the validity of a statute of any state is drawn in question as being repugnant to the United States Constitution and the judgment of the State Court is in favor of its validity.

QUESTIONS PRESENTED

Do the arbitrary and mandatory 10 year license revocation provisions of N.J.S.A. 39:4-50(a)(3) that apply to third offenders of New Jersey's Drinking Driving Law, violate due process of law?

Does the failure of N.J.S.A. 39:4-50(a)(3) to provide a means for a third offender of that law to seek reinstatement of his license before the end of 10 years violate due process of law?

STATEMENT OF THIS CASE

On July 1, 1985 the appellant entered a plea of guilty as a third offender under New Jersey's drinking Driving law.

The plea was entered in the Municipal Court of the Boro of Freehold, New Jersey. The municipal court judge, among other sanctions, was mandatorially required to revoke the drivers license of the appellant for 10 years. He could not

consider any mitigating factors as they might relate to the license revocation period.

New Jersey does not have in its law a means for a person to obtain a special license to work and earn a living after his license has been revoked for any reason.

A municipal court judge in New Jersey does not have the jurisdiction to declare a State Statute or part thereof unconstitutional. Even so, it was at this initial level that the issue of the validity of the 10 year revocation provision was raised.

An appeal, limited solely to the issue of the constitutionality of the 10 year mandatory revocation provision of N.J.S.A. 39:4-50 was filed and heard de novo on the record of the Municipal Court

of the Borough of Freehold by a Judge of the Superior Court of New Jersey Law Division-Criminal, Monmouth County.

The Judge at this level held that there was no constitutional defect in the Statute and he was bound to enforce it as written by the legislature.

An appeal from this decision was filed in the Superior Court of New Jersey Appellate Division and the same issues were presented to that court.

The Appellate Division of the Superior Court of New Jersey at p. 2 of its decision said:

> On this appeal the defendant argues that this mandatory 10 year license revocation imposed under the motor vehicle law violates due process of law and that the failure of that statute to provide a means for reinstatement of a third offender's license (prior to the expi-

ration of that period) violates due process of law.

This language clearly shows that the issues presented and the rulings of that court upholding the validity of the statute are of a nature to bring this case within the Jurisdiction of the United States Supreme Court.

FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal presents a question of public importance involving the constitutionality of a provision of New Jersey's "drinking and driving law", N.J.S.A. 39:4-50.

The mandatory ten (10) year license revocation provision of that statute violates due process of law. It fails to provide a meaningful hearing before a defendant's license can be revoked and it fails to provide a means to restore a

defendants license during the ten (10) year period if the reason for the suspension ceases to exist.

Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586 (1971) held that a persons drivers license is not to be taken away without that procedural due process required by the Fourteenth Amendment.

The Bell Court recognized:

> Once licenses are issued as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involved State action that adjudicates important interests of the licensees.

Bell, 402 U.S. at ___, 91 S.Ct. at 1589.

The right to earn a livelihood is a property right which is guaranteed by the 5th and 14th Amendments of the Federal Constitution and the Constitution of the

State of New Jersey. Lane Distributors, Inc., v. Tilton, 7 N.J. 349 (1951); State v. N.J. Trade Waste Ass'n., 191 N.J. Super. 144 (Law Div. 1983).

Licenses, therefore, should not be taken away without due process, and due process requires a hearing before the license should be taken for an extended period.

The hearing required by the Due Process Clause must be meaningful and appropriate to the nature of the case. Bell v. Burson, supra. The Bell Court said:

> While "(m)any controversies have raged about * * * the Due Process Clause," it is fundamental that except in emergencey situations (and this is not one) due process requires that when a state seeks to terminate an interest such as that here involved, it must afford "notice and op-

> portunity for hearing appropriate to the nature of the case" before the termination becomes effective.

Bell, 402 U.S. at ___, 91 S.Ct. at 1591 (citations omitted).

The Court also said:

> The State argues that the licensee's interest in avoiding the suspension of his license is outweighed by countervailing govermental interests and therefore that this procedural due process need not be afforded him. We disagree.

Bell, 402 U.S. at ___, 91 S.Ct. at 1590.

While the government's interest in protecting the public from the drinking driver is important, it cannot justify the removal of a persons license when no emergency exists without a meaningful hearing and procedural due process.

There was no hearing of any kind before the removal of the appellant's license for ten (10) years and no emergency existed because his license had been taken as a result of the prior violations.

Because of the mandatory ten (10) year revocation provisions of the statute, the defendant was precluded from effectively presenting any medical evidence pertinent to his situation, any evidence of the effect of the revocation upon his ability to support himself or his family, and any other evidence, including his prior good driving record that had a bearing upon whether his license should have been revoked for ten (10) years.

Under statutes such as N.J.S.A. 39:4-50, license revocations are designed to protect the public and not designed to punish the licensee. Vance v. State,

67 N.J. Super. 63 (App. Div. 1961); Bungardeanu v. England, 219 A. 2d 104 (D.C. Ct. App. 1966); 60 ALR 3rd at p. 357.

The punitive aspects of that statute are clear and consist of fines, jail terms, community service and surcharges.

Implicit in N.J.S.A. 39:4-50 is the legislative recognition that persons involved in driving and drinking may have a drinking problem that can be treated.

It provides in part that in lieu of a jail sentence a person...

> "...may be committed to an inpatient rehabilitation program..."

It does not provide for a reduction in the ten (10) year revocation or a procedure for reinstatement of a third offender's license if treatment is successful or the reason for the revocation ceases to exist.

Bell v. Burson, supra., by holding an issued drivers license is an "important interest" or an "entitlement" eliminated any distinction between a right and a privilege as these terms may be applied to a drivers license.

If a drivers license is an "entitlement" as decreed by the Supreme Court of the United States, and the right to earn a livelihood is a property right, an extended mandatory period of revocation, such as ten (10) years, without a procedure for reinstatement, violates due process of law.

The failure of our legislature to provide a mechanism for third offenders to seek reinstatement of their license before the end of ten (10) years, if the circumstances warrant reinstatement, renders

that part of N.J.S.A. 39:4-50 unconstitutional within the meaning of Bell v. Burson, supra.

This is especially applicable in states that have inadequate mass transit systems.

Persons convicted of serious crimes are entitled to periodic review of their sentence to determine parole eligibility, N.J.S.A. 30:4-123.45, et seq. The key areas for parole consideration are protection of the public and rehabilitation of the defendant. Greenholtz v. Inmates of Nebraska Penal & Cor., 442 U.S. 1, 99 S. Ct. 2100 (1979).

If a person has successfully conquered a drinking problem and no longer is a danger to the public, there is no reason to keep such a person off the roads. To

deprive such a person of a meaningful hearing for reinstatement violates procedural due process.

It is the obligation of our judicial system not only to protect the public but, more important, to protect individuals from over zealous action of legislatures and courts that is based upon public furor and fear.

No longer can our judicial system deny persons accused of or convicted of drunk driving full protection of the law because their violation is not serious enough to warrant that kind of protection, or because it would not be expedient from a law enforcement and a judicial administration standpoint to permit that protection. See State v. Macuk, 57 N.J. 1 (1970) which was specifically overruled by Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984).

CONCLUSION

Appellant submits that this appeal brings before the court substantial federal questions which require plenary consideration, with briefs on the merits and oral arguement.

Respectfully submitted,

TANNER, MCGOVERN & VERGA
Attorneys for Defendant-Petitioner

By: /s/ William D. McGovern
WILLIAM D. MCGOVERN

APPENDIX A

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-954-85T4

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

THOMAS E. MC GOVERN,
Defendant-Appellant.

Submitted: June 16, 1986
Decided: June 30, 1986
Filed: June 30, 1986

Before Judges Pressler and Petrella.

On appeal from Superior Court, Law Division, Monmouth County.

Tanner, McGovern & Verga, attorneys for appellant (William D. McGovern on the brief).

John A. Kaye, Monmouth County Prosecutor, attorney for respondent (Mark P. Stalford, Assistant Prosecutor, of counsel and on the letter brief).

PER CURIAM

The sole issue on this appeal is the mandatory sentence required for a third offender convicted of driving while under the influence. Defendant pleaded guilty to driving under the influence, the third such conviction within the space of less than a year.[1] He entered this plea with knowledge of the statutory penalties and with the understanding that a separate charge of reckless driving would merge with the conviction of driving under the influence. Defendant did not contest the charge of driving under the influence or the fact that it was a third offense. His sole challenge in the courts below and here is an attack on the third offense

---

1 The convictions in the other two driving under the influence cases were appealed to this court. These convictions were affirmed in decisions under docket NO. A-4280-84, on April 23, 1986 and docket No. A-2254-84, on March 5, 1986.

penalty provisions. The municipal court judge sentenced defendant as a third offender and imposed a $1,000 fine, a $100 surcharge, 180 days in-patient care at a Veterans Administration hospital, and revoked defendant's driver's license for the mandatory 10 years. On appeal to the Law Division defendant contested the sentence. The judge rejected his arguments and the identical penalties were imposed.

On this appeal defendant argues that the mandatory 10 year license revocation imposed under the motor vehicle laws violates due process of law and that the failure of that statute to provide a means for reinstatement of a third offender's license (prior to the expiration of that period) violates due process of law.

Defendant argues that the penalty aspects of the statute were satisfied by the imposition of the fine and the surcharge, as well as commitment to a rehabilitation program, and that since the statute does not provide for reinstatement of a license if the program proves successful, an important interest is being eliminated, thus violating due process of law.

N.J.SA. 39:4-50 provides in part:

> For a third or subsequent violation a person...shall thereafter forfeit his right to operate a motor vehicle over the highways of this State for 10 years.

We reject defendant's argument that an extended term of revocation of a driver's license is not intended to be punitive. The revocation has both punitive and deterrent aspects, both to him and to others. Here, this defendant

was convicted on two prior occasions within a very short period of time, and nonetheless, while his license revocation sentences were stayed pending appeals, he received a driving while under the influence summons on December 12, 1984. Obviously, the shorter revocation periods imposed on the prior convictions were not sufficiently punitive for defendant.

Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), relied on by defendant, does not provide support for his argument that due process requires a separate hearing on this penalty. That case involved a requirement for the posting of security for uninsured motorists in negligence actions without regard to whether the defendant was negligent or at fault.

Mandatory sentencing provisions have been determined to be constitutionally proper. See, e.g. Rummell v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (mandatory life sentences upheld under Texas recidivist statute); State v. Stewart, 96 N.J. 596 (1984) (upholding mandatory sentencing provision of the Graves Act).

Here, defendant declined the opportunity to contest the complaint against him, unlike the defendant in Bell, and pleaded guilty.

We find no merit in defendant's argument that the failure of N.J.S.A. 39:4-50 to provide a means for reinstatement of the third offender's license during the suspension violates due process. R. 2:11-3(e)(2). Defendant was represented by counsel and was fully aware

of the penalties involved as a consequence of his plea and had the opportunity for a hearing to contest his guilt.

Affirmed.

A TRUE COPY

/s/ Elizabeth McLaughlin

ELIZABETH McLAUGHLIN

Clerk

APPENDIX B

SUPREME COURT OF NEW JERSEY
C-117 SEPTEMBER TERM 1986

26,031

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs. ON PETITION FOR CERTIFICATION

THOMAS E. MC GOVERN,
Defendant-Petitioner,

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-954-85T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 30th day of September, 1986.

Filed October 2, 1986.
A TRUE COPY

/s/ Stephen Townsend
STEPHEN TOWNSEND

APPENDIX C

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs. No. A-954-85T4

THOMAS E. McGOVERN,
Defendant-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Thomas E. McGovern, the Defendent-Appellant above named, hereby appeals to the Supreme Court of the United States from the June 30, 1986 final judgment of the Superior Court of New Jersey, Appellate Division, which affirmed the decision of the Superior Court of New Jersey, Law Division, Monmouth County.

A Petition for Certification of the judgment of the Superior Court, Appellate Division, was filed with the Supreme Court of the State of New Jersey, and that Petition for Certification was denied on September 30, 1986.

This appeal is taken pursuant to the United States Code, Title 28, Section 1257.2.

Filed: December 19,1986

Respectfully submitted,

/s/William D. McGovern
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Appendix D

39:4-50. Operating or allowing operation by person under influence of liquor or drugs; penalties; alcohol education or rehabilitation; collection of driver's license; rights of discovery; intoxicated driver resource centers

(a) A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits

another to operate a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood, shall be subject:

(1) For the first offense, to a fine of not less than $250.00 nor more than $400.00 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day and served as prescribed by the program requirements of the Intoxicated Driver Resource Centers established under subsection (f) of this section and, in the discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of not less than six months nor more than one year. (Last additions in text indicated by underline; last deletions by strikeouts.)

(2) For a second violation, a person shall be subject to a fine of not less than $500.00 nor more than $1,000.00, and shall be ordered by the court to perform community service for a period of 30 days, which shall be of such form and on such terms as the court shall deem appropriate under the circumstances, and shall be sentenced to imprisonment for a term of not less than 48 consecutive hours, which shall not be suspended or served on probation, nor more than 90 days, and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of two years upon conviction, and, after the expiration of said period, he may make application to the Director of the Division of Motor Vehicles for a license to operate a motor vehicle, which

application may be granted at the discretion of the director, consistent with subsection (b) of this section.

(3) For a third or subsequent violation, a person shall be subject to a fine of $1,000.00, and shall be sentenced to imprisonment for a term of not less than 180 days, except that the court may lower such term for each day, not exceeding 90 days, served performing community service in such form and on such terms as the court shall deem appropriate under the circum-stances and shall thereafter forfeit his right to operate a motor vehicle over the highways of this State for 10 years.

If the driving privilege of any person is under revocation or suspension for a violation of any provision of this Title at the time of any conviction for a violation of this section, the revocation

or suspension period imposed shall commence as of the date of termination of the existing revocation or suspension period. A court that imposes a term of imprisonment under this section may sentence the person so convicted to the county jail, to the workhouse of the county wherein the offense was committed, to an inpatient rehabilitation program or to an Intoxicated Driver Resource Center or other facility approved by the Director of the Division of Motor Vehicles and the Director of the Division of Alcoholism in the Department of Health; provided that for a third or subsequent offense a person shall not serve a term of imprisonment at an Intoxicated Driver Resource Center as provided in subsection (f).

A person who has been convicted of a previous violation of this section need not be charged as a second or subsequent

offender in the complaint made against him in order to render him liable to the punishment imposed by this section on a second or subsequent offender, but if the second offense occurs more than 10 years after the first offense, the court shall treat the second conviction as a first offense for sentencing purposes and if a third offense occurs more than 10 years after the second offense, the court shall treat the third conviction as a second offense for sentencing purposes.

(b) A person convicted under this section must satisfy the screening, evaluation, referral and program requirements of the Division of Motor Vehicles' Alcoholism's Bureau of Alcohol Countermeasures, and of the Intoxicated Driver Resource Centers and a program of alcohol education and highway safety, as prescribed by the Director of the Division

of Motor Vehicles. The sentencing court shall inform the person convicted that failure to satisfy such requirements shall result in a mandatory two day term of imprisonment in a county jail and a driver license revocation or suspension and continuation of revocation or suspension until such requirements are satisfied, unless stayed by court order in accordance with Rule 7:8-2 of the N.J. Court Rules, 1969, or R.S. 39:5-22. Upon sentencing, the court shall forward to the Bureau of Alcohol Countermeasures a copy of a person's conviction record. A fee not to exceed of $40.00 shall be payable to the Division of Motor Vehicles for the Bureau of Alcohol Countermeasures' screening and evaluation program Alcohol Education, Rehabilitation and Enforcement Fund established pursuant to section 3, P.L. 1983, c. 531 (C. 26:28-32) to support the

Bureau of Alcohol Countermeasures, to defray the cost of screening, evaluation and alcohol education programs in the Intoxicated Driver Resource Centers.

(c) Upon conviction of a violation of this section, the court shall collect forthwith the New Jersey driver's license or licenses of the person so convicted and forward such license or licenses to the Director of the Division of Motor Vehicles. The court shall inform the person convicted that if he is convicted of personally operating a motor vehicle during the period of license suspension imposed pursuant to subsection (a) of this section, he shall, upon conviction, be subject to the penalties established in R.S. 39:3-40. The person convicted shall be informed orally and in writing. A person shall be required to acknowledge receipt of that written notice in writing.

Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of R.S. 39:3-40. In the event that a person convicted under this section is the holder of any out-of-state driver's license, the court shall not collect the license but shall notify forthwith the director, who shall, in turn, notify appropriate officials in the licensing jurisdiction. The court shall, however, revoke the nonresident's driving privilege to operate a motor vehicle in this State, in accordance with this section. Upon conviction of a violation of this section, the court shall notify the person convicted, orally and in writing, of the penalties for a second, third or subsequent violation of this section. A person shall be required to acknowledge

receipt of that written notice in writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of this section.

(d) The Director of the Division of Motor Vehicles shall promulgate administrative rules and regulations pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.) in order to effectuate the purposes of this set establish a program of alcohol education and highway safety, as prescribed by this act.

(e) Any person accused of a violation of this section who is liable to punishment imposed by this section as a second or subsequent offender shall be entitled to the same rights of discovery as allowed defendants pursuant to the Rules Governing

Criminal Practice, as set forth in the Rules Governing the Courts of the State of New Jersey.

(f) The counties, in cooperation with the Division of Alcoholism and the Division of Motor Vehicles, but subject to the approval of the Division of Alcoholism, shall designate and establish on a county or regional basis Intoxicated Driver Resource Centers. These centers shall have the capability of serving as community treatment referral centers and as court monitors of a person's compliance with the ordered treatment, service alternative or community service. All centers established pursuant to this subsection shall be administered by a certified alcoholism counsellor or other professional with a minimum of five years' experience in treatment of alcoholism. All centers shall be required to develop

individualized treatment plans for all persons attending the centers; provided that the duration of any ordered treatment or referral shall not exceed one year. It shall be the center's responsiibility responsibility to establish networks with the community alcohol education, treatment and rehabilitation resources and to receive monthly reports from the referral agencies regarding a person's participation and compliance with the program. Nothing in this subsection shall bar these centers from developing their own education and treatment programs; provided that they are approved by the Division of Alcoholism.

Upon a person's failure to report to the initial screening or any subsequent ordered referral, the Intoxicated Driver

Resource Center shall promptly notify the sentencing court of the person's failure to comply.

Required detention periods at the Intoxicated Driver Resource Centers shall be determined according to the individual treatment classification assigned by the Bureau of Alcohol Countermeasures. Upon attendance at an Intoxicated Driver Resource Center,a person shall be assessed a per diem charge not to exceed <u>of</u> $25.00 to be collected by the center and used to defray costs. The per diem charge may be waived by the sentencing court upon good cause shown.

<u>The centers shall conduct a program of alcohol education and highway safety, as prescribed by the Director of the Division of Motor Vehicles.</u>

The Director of the Divisions of Alcoholism and Motor Vehicles Director of the Division of Alcoholism shall adopt rules and regulations pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.), in order to effectuate the purposes of this subsection.

Amended by L.1977, c. 29, § 1; L.1981, c. 47, § 1, eff. Feb. 25, 1981; L.1981, c. 537, § 1; L.1982, c. 53, § 2, eff. July 1, 1982; L.1982, c. 58, § 1, eff. July 6, 1982; L.1983, c. 90, § 2, eff. March 11, 1983; L.1983, c. 129, § 1, eff. April 7, 1983; L.1983, c. 444, § 1; L.1984, c. 243, § 1, eff. Jan. 2, 1985.

No. 86-1524

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS E. MC GOVERN,

Appellant,

-vs-

STATE OF NEW JERSEY,

Appellee.

On Appeal from the Superior Court of New Jersey,
Appellate Division.

MOTION OF APPELLEE TO DISMISS [or AFFIRM]

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1. This court lacks the requisite jurisdiction pursuant to 28 U.S.C.S. §1257(2) over this appeal,in that, the Constitution of the United States, treaties or laws of the United States were not specifically raised by the Defendant nor addressed by the Superior Court of New Jersey, Appellate Division, in its decision upholding the validity of N.J.Rev. Stat. §39:4-50.....4

2. Because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument, the State of New Jersey moves the Court to dismiss the appeal herein; or in the alternative, to affirm the judgment of the Superior Court, Appellate Division.....12

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No. 86-1524

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

THOMAS E. MC GOVERN, APPELLANT

vs.

STATE OF NEW JERSEY, APPELLEE

ON APPEAL FROM THE SUPERIOR COURT OF
NEW JERSEY, APPELLATE DIVISION

MOTION OF APPELLEE TO DISMISS
[or AFFIRM]

Pursuant to Rule 16.1, the appellee State of New Jersey moves the Court to dismiss the appeal herein for want of jurisdiction, or in the alternative, to affirm the judgment of the Superior Court of New Jersey, Appellate Division, on the Ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

STATEMENT OF THIS CASE

On December 12, 1984, the defendant was arrested in the Borough of Freehold, Monmouth County, New Jersey, for driving under the influence of alcohol in violation of N.J.Rev. Stat. §39:4-50 and for reckless driving in violation of N.J.Rev. Stat. §39:4-96.

On July 1, 1985, the defendant entered a plea of guilty in the Freehold Borough Municipal Court. The reckless driving charge was merged into the driving under the influence charge. Because this was the defendant's third offense in a seven (7) month period, he was sentenced by the municipal court judge as a third offender. The judge imposed a fine of one thousand dollars, fifteen dollars court costs, one hundred dollars surcharge and revoked defendant's driving privileges for a period

of ten years, pursuant to N.J.Rev. Stat. §39:4-50(3). Additionally, the defendant was sentenced to 180 days incarceration which, based upon application of the defendant, was to be served as an in-patient in an alcohol treatment facility.

ARGUMENT

1. This Court lacks the requisite jurisdiction pursuant to 28 U.S.C.S. §1257(2) over this appeal in that the Constitution of the United States, treaties or laws of the United States were not specifically raised by the defendant nor addressed by the Superior Court of New Jersey, Appellate Division, in its decision upholding the validity of N.J.Rev. Stat. §39:4-50.

The defendant, in his jurisdictional statement, seeks to invoke the appellate powers of this Court by challenging the constitutionality of the mandatory sentencing provisions of New Jersey's Drunk Driving Statute. Specifically, the defendant proffers that the language of the New Jersey Court "clearly shows that the issues presented and rulings of the Court upholding the validity of the Statute, are of a nature to bring this case within the jurisdiction of the United States Supreme Court." Jurisdictional Statement for Appellant at 7.

However, a closer inspection of the per curiam opinion from which this appeal is taken shows that nowhere is reference made to the Constitution of the United States or to any federal treaties or laws. The State of New Jersey submits that the mere reference by defendant that the statute violates "due process of law" should not suffice to bring it within the jurisdictional ambit contemplated by 28 U.S.C.S. §1257(2).

The Supreme Court's mandatory appellate jurisdiction over state-court judgments under §1257 is "reserved for cases threatening the supremacy of federal law." Key v. Doyle, 434 U.S. 59, 69, 98 S.Ct. 280, 285 (1977). There are several policy considerations upon which this jurisdictional requirement is based. As an initial proposition, federal questions not raised in State Court are very likely to be reflected

by an inadequate record. Additionally, in a federal system, the State Courts should be given the first opportunity to consider "the applicability of State Statutes in light of [federal] constitutional challenge." Cardinale v. Louisiana, 394 U.S. 437, 439, 89 S.Ct. 1154 (1969). Finally, a properly posed federal question could still be foreclosed by an adequate and independent state ground making review of the federal issue unnecessary. Id. Therefore it remains well-settled that "it must be made to appear that some provision of the Federal, as distinguished from the State, Constitution was relied upon and that provision must be set forth." New York Central & H.R.Co. v. New York, 186 U.S. 269, 273, 22 S.Ct. 916, 917 (1902). When a claim is made that a state statute denies "constitutional rights" or violates "due process", it must be assumed

absent an express statement or clear intendment to the contrary that the defendant is relying upon the State Constitution. New York ex. rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63 (1928), Bowe v. Scott, 233 U.S. 658, 664-665, 34 S.Ct. 769, 771 (1914).

Of course it is equally clear that a simple failure to cite the proper constitutional provisions will not bar an action. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 159, 101 S.Ct. 446, 449 n.5 (1980); Taylor v. Kentucky, 436 U.S. 478, 482, 98 S.Ct. 1930, 1933 n. 10 (1978). However, in both of the above-cited cases the Court was able to find sufficient basis for consideration of the federal issues in explicit reliance on the Federal Constitution somewhere in the State Court proceedings. Webb's Fabulous Pharmacies, Inc., supra, 449

U.S. 155, 159, 101 S.Ct. 446, 449 n.5.

The Court has never found ambiguous references to an amorphous concept of constitutionality or due process sufficient to invoke its obligatory appellate jurisdiction. Air Pollution Variance Board v. Western Alfalfa, 416 U.S. 861, 866, 94 S.Ct. 2114, 2116 (1974).

If a State Court does no more than interpret a State Statute without expressly considering such interpretation in light of a federal question, the Supreme Court of the United States should not review that decision. Beck v. Washington, 369 U.S. 541, 549-550, 82 S.Ct. 955, 959-960 (1962).

New Jersey Courts have historically not hesitated from basing their decisions, when being faced with constitutional challenges, or provisions of the New Jersey Constitution. See e.g., State v. Novembrino, 105 N.J. 95,

145-146 (1986). This is particularly true in the context of criminal prosecutions. As the Court stated:

> Our conclusion as to which of these courses to follow is strongly influenced by what we perceive to be the likely import of our decision on the privacy rights of our citizens and the enforcement of our criminal laws, matters of "particular state interest" then afford an appropriate basis for resolving this issue on independent state grounds. [See State v. Hunt, supra, 91 N.J. at 366. (Handler, J., concurring) ("A state constitution may also be employed to address matters of particular state interest.")].

State v. Novembrino, supra, 105 N.J. at 146. It is well-settled that the record must affirmatively show that the federal issue has been raised, White River Lumber Co. v. Arkansas ex.rel. Applegate, 279 U.S. 692, 700, 49 S.Ct. 457, 460 (1929); Whitney v. California, 274 U.S. 357, 362-63, 47 S.Ct.

641, 643-644 (1927); Hiawassee River Power Co. v. Carolina-Tennessee Power Company, 252 U.S. 341, 344, 40 S.Ct. 330, 331-332 (1920); Thomas v. Iowa, 209 U.S. 258, 28 S.Ct. 487 (1908); briefs and oral arguments cannot be used to establish a federal question where the opinion sought to be reviewed is silent. Live Oak Ass'n. v. Railroad Commission, 269 U.S. 354, 357-58, 46 S.Ct. 149, 150-151 (1926); Lynch v. New York ex. rel. Pierson, 293 U.S. 52, 54, 55 S.Ct. 16, 17 (1934).

The State submits that in the absence of express reliance by the New Jersey Superior Court, Appellate Division, in its per curiam opinion, State of New Jersey v. Thomas E. McGovern, No. A-954-85T4, slip op. (N.J.Super. Ct. App. Div. June 30, 1986), on any federal Constitutional provision the United States Supreme Court is without

jurisdiction, pursuant to 28 U.S.C.S. §1257(2),. to review the decision of the court, and as such this case should be summarily dismissed.

2. Because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument, the State of New Jersey moves the Court to dismiss the appeal herein; or, in the alternative, to affirm the judgment of the Superior Court, Appellate Division.

The defendant seeks the review of the United States Supreme Court under 28 U.S.C.S. §1257(2). This statute provides that where the validity of a state statute is drawn in question as being repugnant to the United States Constitution and the judgment of the State Court upholds the validity of the statute, the Appellate jurisdiction of the United States Supreme Court may be invoked. Assuming, arguendo, the validity of N.J. Rev. Stat. §39:4-50 was upheld in the face of a federal Constitutional challenge, (See Point One); it is well-settled that review by the Supreme Court is not automatic. Zucht v. King, 260 U.S. 174, 175, 43 S.Ct. 24, 25 (1922). It is the duty of the Court to

decline jurisdiction, "whenever it appears that the constitutional question is not... substantial in character." Zucht v. King, supra, 260 U.S. at 176, 43 S.Ct. at 25. The substantiality requirement has not been departed from in the context of the Court's appellate jurisdiction under 28 U.S.C.S. §1257(2). Hicks v. Miranda, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289 (1975).

Defendant essentially argues that the mandatory sentencing provisions of New Jersey's drunk driving statute violate due process of law because they impose a ten year license revocation period with no opportunity for reinstatement within those ten years. The defendant relied primarily upon Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586 (1971) for support of his proposition. The argument the defendant proffers is neither novel nor persuasive.

Legislative enactments are presumed to be constitutional; when a challenge to a statute is raised, every intendment favors constitutionality. United States v. Harris, 347 U.S. 612, 618, 74 S.Ct. 808, 812 (1954). While it is true that there cannot be unnecessary and excessive restrictions on the use of private property or the pursuit of useful activities, a legislative enactment must be upheld provided there is a rational nexus between the classification, or the means used, and a valid legislative purpose. Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734 (1974); Rinaldi v. Yeager, 384 U.S. 305, 86 S.Ct. 1497 (1966). Where the Legislature has approached a problem and devised a solution that is reasonable and based upon practical considerations, it must be upheld. South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803 (1966). The mandatory license

revocation for those convicted of driving while under the influence of alcohol is supported rationally by the policy considerations of the protection this statute affords the public from the dangers of drunken driving.

Indeed the Court has recognized the "compelling interest in highway safety," Mackey v. Montrym, 443 U.S. 1, 17-19, 99 S.Ct. 2612, 2620-2621 (1979), motivating legislative responses to the menace of the drunken driver.

In South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916 (1983), the Court articulated its recognition of these concerns:

> The situation underlying this case -that of the drunk driver - occurs with tragic frequency on our nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the

> daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. See Breithaupt v. Abram, 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed.2d, 448 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); Tate v. Short, 401 U.S. 395, 401, 91 S.Ct. 668, 672, 28 L.Ed.2d, 130 (1971)(BLACKMUN, J. concurring) (deploring traffic irresponsibility and the frightful carnage it spews on our highways"); Perez v. Campbell, 402 U.S. 637, 657 and 672, 91 S.Ct. 1704, 1715 and 1722, 29 L.Ed.2d, 233,(1971) (BLACKMUN, J. concurring)(footnote omitted)("the slaughter on the highways of this nation exceeds the death toll of all our wars").

South Dakota v. Neville, supra, 459 U.S. at 558, 103 S.Ct. at 920.

In the face of such substantial dangers to public safety, it is clearly within the province of the Legislature to mandate the penalties it deems necessary to adequately

deter this threatening behavior and protect the safety of the general public, including, incidentally, that of the intoxicated driver.

Mandatory sentencing provisions have been expressly approved by the Court as constitutionally proper. Rummell v. Estelle, 445 U.S. 263, 100 S.Ct. 1133 (1980). In view of the unambiguous language used in N.J. Rev. Stat. §39:4-50 evidencing the legislative goal to protect the public by removing presumptively unsafe drivers fron the road, there is no room for judicial construction. Powell v. Texas, 392 U.S. 514, 538, 88 S.Ct. 2145 (1967), reh'g denied 393 U.S. 898, 89 S.Ct. 65 (1968).

The defendant argues that the mandatory license revocation provision of N.J.Rev. Stat. §39:4-50 is violative of due process because it offers no opportunity for reinstatement. Defendant proffers Bell v.

Burson, supra, 402 U.S. 535, 91 S.Ct. 1586, in support of his argument, interpreting Bell as conferring an almost "fundamental right" to operate an automobile and as requiring some extraordinary measure of procedural process above that currently afforded the individual under the laws of New Jersey.

This treatment of Bell v. Burson is often used and has been repeatedly rejected by the Court. Mackey v. Montrym, supra, 443 U.S. 1, 11, 99 S.Ct. 2612, 2617; Dixon v. Love, 431 U.S. 105, 97 S.Ct. 1723 (1977). In Bell v. Burson, supra, the Court held that Georgia's Motor Vehicle Safety Responsibility Act did not afford the requisite procedural due process. The Georgia statute provided that the driver's license and registration of an uninsured motorist involved in an accident shall be suspended unless the motorist posted security for the amount of damage claimed by

the aggrieved party. However, this procedure was found violative of due process because it excluded any consideration of fault or responsibility previous to suspension. The Court determined that before the State could deprive an individual of his license, it must provide a procedure for determining the question of whether there was a reasonable possibility of a judgment being rendered against him. Bell v. Burson, supra, 402 U.S. at 543, 91 S.Ct. at 1591.

The Court in Mackey v. Montrym, supra, 443 U.S. 1, 99 S.Ct. 2612, addressed a similar challenge to the Massachusetts' statutory scheme providing for the administrative suspension of a license upon report of an arrest for operating a motor vehicle while under the influence of an intoxicating liquor, if the person arrested refused to submit to a breathalyzer after

having been informed that his license would be suspended. Mackey v. Montrym, supra, 443 U.S. at 5, 99 S.Ct. at 2613-2614. The Court applied the procedural due process analysis articulated in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) to find that the summary suspension procedure contained in Massachusetts' mandatory revocation statute was constitutional.

The Court found that the nature of the private interest involved is the driver's property interest in the continued possession and use of his license. Specifically, the Court assessed that interest when a license is revoked pending the outcome of a hearing. Mackey v. Montrym, supra. 443 U.S. 1, 11, 99 S.Ct. 2612, 2617. In balancing the effect of the summary action taken by the State against this private interest, the Court found that the weight of the interest involved did not

compel a conclusion that the procedure was unconstitutional. Mackey v. Montrym, supra, 443 U.S. at 12-13, 99 S.Ct. at 2617. In the instant case the procedure is not a summary administrative disposition based upon an arrest report, as in Mackey v. Montrym. Here, there is an opportunity for a full judicial hearing and the mandatory sentencing provisions are applicable only upon conviction. N.J.Rev. Stat. §39:4-50, N.J.CT.R. 7:1, et. seq., (jurisdiction of the municipal court); N.J.CT. R. 7:4 et. seq., (trial of offenses by the municipal court judge); N.J.CT. R. 7:6 et. seq., (traffic offenses); N.J.CT. R. 7:8 et. seq., (appeals).

The adversary process,long considered by the Court to be best means of ascertaining the truth and minimizing the risk of erroneous deprivation of a private interest, Dixon v. Love, supra, 431 U.S. 105, 113, 97

S.Ct. 1723,1728, is fully available to any individual charged with a violation of New Jersey's drunk driving statute. In this instance, the defendant chose not to exercise his right to trial and pleaded guilty. (Jurisdictional Statement p.4).

The last component of the Eldridge balancing test requires an identification of the governmental function involved, the State's interest in the procedures used, as well as the administrative and fiscal burdens of a substitution of the procedures sought. Mackey v. Montrym, supra, 443 U.S. at 17-19, 99 S.Ct. at 2620-2621, Dixon v. Love, supra, 431 U.S. 105, 97 S.Ct. 1723.

As repeatedly acknowledged by the Court, the type of statute enacted in aid of the State's police function for the purpose of "preserving the safety of its public highways, standing alone, fully distinguishes

this case from Bell v. Burson [citation omitted]." Mackey v. Montrym, supra, 443 U.S. at 17, 99 S.Ct. at 2620.

Additionally, that interest in public safety is substantially served by the mandatory nature of the license revocation. A mandatory penalty serves as a strong deterrent to drunken driving, by promptly removing such drivers from the road a higher degree of safety on the highways is insured. Mackey v. Montrym, supra, 443 U.S. at 18, 99 S.Ct. at 2621.

The defendant recommends as an alternative to a mandatory revocation some future opportunity for reinstatement. Certainly the legislature had the opportunity tc consider this alternative as they framed this statute. The State, for policy reasons of its own, elected to enact an automatic penalty to be incurred by those who are third

or subsequent offenders under N.J.Rev. Stat. §39:4-50; this Court has traditionally accorded the States great leeway in adopting mandatory procedures to protect public health and safety. Mackey v. Montrym, supra, 443 U.S. at 117, 99 S.Ct. at 2620.

Additionally, it is by no means clear that a case-by-case discretionary process based upon assessments of individual "rehabilitation" would be the best way to assure either procedural or substantive fairness. Objective mandatory penalties provide all drivers with "more precise notice of what conduct will be sanctioned and promotes equality of treatment among similarly situated drivers." Dixon v. Love, supra, 431 U.S. 105, 115, 97 S.Ct. 1723, 1729.

The potential loss of employment is a heavy consequence indeed. The State would

submit that this consequence is not the result of a deprivation of due process on the part of the State, but instead is the consequence of operating an automobile while under the influence of alcohol, and in the defendant's case, doing so repeatedly. The consequences of that unlawful activity must be borne by the offender, not the citizens of New Jersey.

CONCLUSION

Therefore, the State of New Jersey respectfully submits that this Court lacks the requisite jurisdiction, pursuant to 28 U.S.C.S. §1257(2) over this appeal. Additionally, the Appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the Superior Court of New Jersey, Appellate Division, in that, the question upon which the case depends is so unsubstantial as not to require further argument.

Respectfully submitted,

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APPENDIX

APPENDIX

RULES GOVERNING PRACTICE IN THE MUNICIPAL COURTS

RULE 7:1 SCOPE

The rules in Part VII, together with the rules in Part III, insofar as applicable and unless unless otherwise expressly provided by law or these rules, govern the practice and procedure in all criminal, quasi-criminal and penal actions in the municipal courts and all such actions transferred from a municipal court to the Superior Court, Chancery Division,Family Part pursuant to R.5:1-2(c)(3) and R. 5:1-3(b)(2). Whenever approval is given for the exercise of such jurisdiction by a county district court,the court may be divided by the Chief Justice into parts for separate hearing of civil and criminal matters.

RULE 7:4-1 Applicability·

Except as otherwise provided by R.7:6 (Traffic Offenses) and 7:7 (Violations Bureau) the provisions of R.7:4 apply to the trial by the court of all complaints charging offenses within its trial jurisdiction and all indictable offenses triable by it upon the defendant's waiver of indictment and trial by jury.

RULE 7:4-2 Proceedings Before Trial

(a) Arraignment

(1) Except as otherwise provided by paragraph (2) of this rule, arraignment shall be conducted in open court and shall consist of reading the complaint to the defendant or stating to him the substance of the charge, and calling on him, after he is given a copy of the complaint to plead thereto. The defendant may waive the reading of the complaint.

RULE 7:4-5 Record of Proceedings; Transcripts

(a) Record. When required by order of the Supreme Court, a court shall cause all proceedings to be recorded by sound recording equipment or by a reporter. When sound recording equipment is used, in addition thereto, or when the proceedings are not otherwise to be recorded, at the request and expense of any party the court shall permit a record of the proceedings to be made by a certified shorthand reporter. Every sound recording and stenographic record of proceedings made pursuant to this rule shall be kept by the clerk of the court or by the reporter, as the case may be, for three years.

(b) Transcript. If the pro-

ceedings have been sound recorded, any person may order a transcript from the clerk of the court, and if proceedings have been recorded stenographically any person may order a transcript from the reporter. In either instance the charge therefor shall not exceed the transcript rates as provided by law. The person preparing a transcript shall certify to its accuracy.

(c) Supervision. The recording of proceedings and the preparation of transcripts thereof, whether by sound recording or stenographic reporters, shall be subject to the supervision and control of the Administrative Director of the Courts.

RULE 7:4-6 Sentence and Judgment

(a) Sentence. If the defendant has been convicted or pleaded guilty to an indictable offense, the court may postpone imposition of a sentence for a period not exceeding 30 days in order to obtain a presentence investigation from the chief probation officer of the county. If the defendant has been convicted or pleaded guilty to a non-indictable offense, sentence shall be imposed immediately unless the court postpones sentencing for a period not exceeding 30 days in order to obtain a presentence report or for other good cause.

(b) Judgment. A judgment of conviction shall set forth the complaint, the plea, the findings, the adjudication and sentence. It shall contain the number of the section and the title or a reasonably short description of the statute or ordinance under which conviction was had, the names and addresses of the witnesses sworn and a list of exhibits produced at the trial. If the defendant is found not guilty or for any other reason is entitled to be discharged, the judgment shall be entered accordingly. The judgment shall be signed by the court and entered by the clerk. If at the time of hearing judgment is rserved, the court upon the entry of judgment of acquittal shall forthwith mail a copy thereof to the defendant by ordinary mail; otherwise, the defendant shall be notified to appear for entry of judgment and sentencing.

(c) Reasons for Sentence. The provisions of R.3:21-4(e) shall apply to the municipal courts.

(d) Conviction of a Corporation. R.3:21-6 is applicable in the event of a conviction of a corporation.

(e) Probation. A convicted defendant may be placed on probation in accordance with R.3:21-7. The order of the court

shall refer to the standard conditions filed with the Superior Court.

(f) Credit for Confinement Pending Sentence. R.3:21-8 is applicable in the event a defendant has been in custody prior to the imposition of a custodial sentence.

(g) Correction or Reduction of Sentence. The provisions of R.3:21-10 (change or reduction of sentence) shall apply to the municipal courts.

(h) Identification Following Conviction. The court may order a person convicted of a non-indictable offense to submit to the taking of fingerprints when the identity of the person is in question.

RULE 7:4-7 New Trial.

The court may, on defendant's motion, grant him a new trial if required in the interest of justice. The court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before, or within 2 years after, final judgment. A motion for a new trial based on other grounds shall be made within 10 days after the

entry of judgment of conviction, or within such further time as the court fixes during the 10-day period. In no event shall this rule be construed to limit the right of a defendant to apply to the court for a(new trial on the ground of fraud or lack of jurisdiction

RULE 7:6-1 Complaint and Summons

(a) Form. In cases involving violations of statutes or ordinances relating to the operation or use of motor vehicles,hereinafter designated as "traffic offenses", the complaint and summons shall be a uniform traffic ticket in the form prescribed by the Administrative Director of the Courts. On a complaint and summons for a non-moving traffic offense, in lieu of the name of the defendant it shall be sufficient to set forth the license number of the vehicle involved, and it shall be presumed that the owner of the vehicle is the defendant charged with the violation.

(b) Issuance. The complaint may be made and signed by a law enforcement officer, or by any other person, but the summons shall be signed and issued only by such officer, or the judge, clerk or deputy clerk of the court in which the complaint is, or is to be filed. R.7:3 relating to

warrants and summons in respect of nonindictable offenses generally, shall be applicable to cases involving a traffic offense, except as otherwise herein provided.

(c) Records and Reports. Each court shall be responsible for all uniform traffic tickets printed and distributed to law enforcement officers or others in his municipality, and for their proper disposition, and shall prepare or cause to be prepared such records and reports relating to such uniform traffic tickets as the Administrative Director of the Courts proscribes. The provisions of this paragraph shall also apply to the Director of the Division of Motor Vehicles and the Superintendent of State Police, in the Department of Law and Public Safety and to the responsible official of any other agency authorized by the Administrative Director of the Courts to print and distribute the uniform traffic ticket to its law enforcement personnel.

RULE 7:8-1 Appeals

Appeals from judgments of conviction shall be taken in accordance with R.3:23 and 3:24, and in extraordinary cases and in the interests of justice, in accordance with R.2:2-3(b).

RULE 3:24. APPEALS FROM ORDERS IN COURTS OF LIMITED CRIMINAL JURISDICTION

(a) Either the prosecuting attorney or the defendant may seek leave to appeal to the Superior Court, Law Division from an interlocutory order entered before trial by a court of limited criminal jurisdiction.

(b) The prosecuting attorney may appeal a pre-trial or post-trial judgment of a court of limited criminal jurisdiction dismissing a complaint.

(c) Appeals pursuant to this rule shall be taken within 10 days after the entry of such order by filing with the Superior Court, Law Division in the county of venue a notice of motion for leave to appeal under paragraph (a) or the notice of appeal under paragraph (b). A copy of the notice shall be filed with the clerk of the court below, and a copy thereof shall be served on the prosecuting attorney as defined by R.3:23-9 or on the defendant or his attorney, as appropriate, at least 10 days prior to the return date fixed therein. The original filed with the court and the copy served shall have annexed thereto copies of all papers of record and any affidavits essential to the determination of the motion and

shall be accompanied by a brief. The respondent shall file and serve his answering brief and other papers in opposition at least 3 days before the hearing. With respect to interlocutory applications, the court may grant or deny leave to appeal on terms and may elect simultaneously to grant the motion and decide the appeal on the merits on the papers before it, or it may direct the filing of additional briefs or make such other order as it deems appropriate for the expeditious disposition of the matter. A copy of any order or judgment entered by it shall be promptly transmitted to the clerk of the court below.